No. 77-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, *Petitioner,*

v.

ASHLAND OIL, INC., *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF THE PETITION

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Phillips Petroleum Company, a respondent herein, supports the Solicitor General's petition for certiorari. Phillips petitioned for certiorari, No. 77-221, to review the same judgment of the United States Court of Appeals for the Tenth Circuit as is the subject of the Government's petition and is filing, at the same time as this memorandum, a petition for rehearing of the Court's denial of its petition for certiorari.

The Solicitor General's petition makes clear the great practical importance of the decision below in terms of its potentially enormous impact on the United States Treasury. It also lays bare the serious flaws in the decision below and thus highlights the doctrinal significance of what was decided below. We file this memorandum without having seen the response of Ashland Oil, Inc., to the Government's petition; the only attempted defense of the court of appeals' judgment on file at this writing is Ashland's brief in opposition to Phillips' petition, and we deal below with some of the arguments made by Ashland.

I.

The United States in its first question presented disputes the court of appeals' conclusion that Section 11 of the Helium Act and the Natural Gas Act together establish a rule that the price terms of contracts under which Phillips and other companies acquired undisputed title to gas streams, including both natural gas and helium, cannot be enforced as to the helium. The court below reasoned that, because the contracts were filed with the Federal Power Commission, the price terms became "utility rates," and Section 11 precluded the superseding utility rates from applying to the helium component of the gas stream. The Government says that there is no such rule even for contracts that the FPC, in the exercise of its power under the Natural Gas Act, has altered insofar as the combustible gas component of the stream is concerned. The Government says that it is only if the FPC has specifically impeded the parties from freely contracting with respect to the helium content of the gas stream that there could be even a conceivable premise for the

court of appeals' novel rule. Phillips agrees. Phillips' petition also emphasizes that, on the facts of this case, a view narrower than the Government's is enough to discredit the court of appeals' decision. There is no possible basis for the court of appeals' disregarding the price terms of the Ashland-Phillips contracts because the FPC did not interfere at all with their operation even as to the combustible component of the gas stream.[1]

In defending the court of appeals' rule in its brief in opposition in No. 77-221, Ashland has suggested that the Tenth Circuit's interim decision in *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951, 1063 (1972), which applied the rule largely to contracts different from the Ashland-Phillips contracts in that they had been frustrated by FPC rate regulation, forecloses the issue because "Phillips is, in reality, seeking review of the *Grounds* case, in which this Court denied certiorari more than five years ago." (Br. Opp., No. 77-221, p. 15.) This Court's denial of certiorari in *Grounds* suggests nothing about the correctness of that decision, and that decision cannot foreclose this Court's judgment.

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[1] There is no question of the accuracy of the statement in the text. In its brief in opposition in No. 77-221 Ashland has asserted that its contracts with Phillips were frustrated "because an FPC filing for [an] increase was not promptly accomplished." (Br. Opp., No. 77-221, p. 18.) As pointed out in both Phillips' (Phillips Pet. 5 n.1) and the Government's (U.S. Pet. 7 n.9) petitions, the FPC never prescribed a ceiling rate that interfered with Ashland's ability to obtain the full contract price to which it was entitled under its contracts with Phillips. Rather, it was *Ashland's* failure to make a timely filing with the FPC that resulted in its failure to receive approval for rate increases. *See* Ashland Oil & Refining Co. v. FPC, 421 F.2d 17 (6th Cir. 1970).

Ashland has also said that "this Court in *Phillips Petroleum Company* v. *Texaco,* 415 U.S. 125 (1974), recognized that Phillips' defense of payment was precluded by federal law, giving rise to a claim in *quantum meruit* for reasonable value." (Br. Opp., No. 77-221, p. 16; see also *id.* at 7, 9, 10.) The contention is plainly without merit. This Court in *Texaco* had no need to reach the issue, and it did not purport to do so. Instead, the Court simply *stated,* in the context of holding that Texaco's complaint alleged no basis for federal question jurisdiction, that any cause of action based on *Grounds* would be, "in effect, an action in *quantum meruit,* whose source is state law and not federal law." 415 U.S. at 129. Far from endorsing *Grounds,* this Court held no more than that a cause of action based on the rationale of *Grounds* did not arise under federal law.

Finally, Ashland has defended the court of appeals' rule of utility regulation by quoting and paraphrasing it at length. (Br. Opp., No. 77-221, pp. 15-17.) Ashland tracks, without explanation or reference to any supporting authorities, the strained logic by which the court of appeals was led to the conclusion that, if Phillips paid the contract price for helium after that price was accepted as the "utility rate," it would be receiving valuable helium "for free" and that this could constitute an "undue preference or advantage" under Section 4(b) of the Natural Gas Act. (Br. Opp., No. 77-221, p. 17.) So far as we are aware, there is no supporting authority for this tortured reasoning. That view is confirmed by the failure of either the court below or Ashland to discuss any. Nor is there any supporting legislative history or policy justification advanced on behalf of such a rule. It is almost

inconceivable that Congress intended, in enacting Section 11 of the Helium Act, to provide a windfall of potentially hundreds of millions of dollars to producers that had already, in voluntary bargains, disposed of the helium over which they once had dominion.

II.

The second question the Government presents is the validity of the court of appeals' method of valuing helium if the value that the parties placed on it by contract is not judged controlling. The Government recognizes that the court of appeals applied federal law in valuing the helium but urges that the court's work-back method is not sanctioned by federal law. Phillips concurs but has presented in its petition the anterior question whether the court of appeals was correct in choosing federal law. The Government agrees that the question which law applies is an important one. (U.S. Pet. 25.)

Ashland in its brief in opposition in No. 77-221 has tried to evade that important question. Contending that the "work-back" valuation method approved by the court is "widely used in the oil and gas producing states" (Br. Opp., No. 77-221, p. 14), Ashland suggests that the "work-back" method is "regularly appl[ied] . . . in appropriate circumstances, involving applications of both federal and state law" (*id.* at 15). It does not address the source of the "work-back" methodology applied by the district court and accepted by the court of appeals; it concedes only that the court of appeals applied federal law to lift the bar of the statute of limitations and to subject Phillips to the payment of pre-judgment interest.

Ashland cannot thus put the important choice-of-law question to rest by ignoring it. There is no doubt that the peculiar version of "work-back" adopted and endorsed by the court below was an attempted application of federal law. It is the product of the district court's erroneous belief that it was trying a federal condemnation case arising under federal law. (Phillips Pet. 7-8, 12.) Consistent with that belief, Phillips is obliged by the court of appeals' judgment to pay Ashland for the "reasonable value" only of the portion of the helium content extracted for the Government.

In any event, on the merits of the court's valuation method, the Government is right in saying that it "affronts ordinary concepts of value, produces a windfall for Ashland, and by virtue of the indemnity agreements could impose a heavy penalty on the government." (U.S. Pet. 23.) And, it should be added, the method penalizes Phillips and the other helium contractors even if the indemnity agreements are enforceable because there is a threshold price below which the companies do not stand to be indemnified.

CONCLUSION

The Government's petition should be granted. It presents important questions that should be resolved by this Court.

Respectfully submitted,

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